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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

ANTHONY T. EASTON

)
) WT Docket No. 97-199
)

PETITION FOR RECONSIDERATION

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SUMMARY

Mr. Anthony T. Easton consistently denied that he engaged in any intentional wrongdoing in the aftermath of the mistaken \$180 million bid made by PCS 2000 L.P. ("PCS 2000"). Nevertheless, in January 1997, the Commission published two orders in which it claimed to have uncovered uncontested facts in a non-public investigation demonstrating that Mr. Easton had made intentional misrepresentations. Based on that "determination", the Commission

assessed a \$1 million forfeiture against PCS 2000. However, the Commission gave Mr. Easton no opportunity to refute the charges against him and to clear his name.

Despite the Commission's claim that there was no unresolved questions of fact, its staff conducted a "further investigation" into the matter, which subsequently led to the issuance of an order that Mr. Easton show cause why he should not be "barred from holding Commission authorizations and participating in future Commission auctions."

I

The Commission lacked the authority to order Mr. Easton to appear before it in a show cause hearing, because he was not a licensee or an applicant for a license. Nor was Mr. Easton otherwise engaged in an activity that would warrant the exercise of the Commission's jurisdiction.

Section 312(b) of the Communications Act of 1934 ("Act") provides that where a person is acting unlawfully, the Commission may order that person to cease and desist from such action. Here, the Commission does not allege that Mr. Easton engaged in any unlawful act after June 28, 1996, and it is attempting to prohibit Mr. Easton from engaging in conduct that is lawful -- obtaining a license or bidding on spectrum.

Issued without authority and in violation of section 9(b) of the Administrative Procedure Act, the Commission's show cause order initiated an ultra vires hearing in which Mr. Easton would have none of the safeguards mandated by section 312 of the Act, and no

opportunity to prove his innocence (the one issue was framed to foreclose any inquiry into whether Mr. Easton actually engaged in misconduct). Because the order was based on the Commission's prejudgment of his guilt, any adjudication based on that order would be impermissibly tainted with unfairness. Consequently, the Commission should vacate its show cause order.

II

The Commission's investigative "conclusion" that Mr. Easton had misrepresented facts caused him reputational injury and triggered his due process right to be heard. Because the Commission elected to pursue a summary enforcement proceeding against PCS 2000, there was never a conclusive determination, based on an evidentiary record, that Mr. Easton committed any intentional misconduct. Mr. Easton has been given no opportunity to adjudicate the issue of whether he had acted intentionally or to otherwise challenge the outcome of the Commission's investigation. That constituted a patent violation of due process, because Mr. Easton was entitled to some kind of hearing in which to tell his side of the story.

Mr. Easton cannot escape entirely from the stigma cast by the Commission's investigation. However, the Commission could mitigate its due process violation. It should prevent further collateral injury to Mr. Easton by modifying its order to include an explicit acknowledgement that there has been no adjudicative determination that he engaged in intentional misconduct.

In the Matter of)
) WT Docket No. 97-199
ANTHONY T. EASTON)

Anthony T. Easton, by his attorneys, and pursuant to section 405(a) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 405(a), petitions the Commission to reconsider its *Memo-randum Opinion and Order, Hearing Designation Order, Notice of Opportunity for Hearing, and Order to Show Cause*, FCC 97-322 (Sept. 9, 1997) ("*Order*") and to vacate the show cause order directed at Mr. Easton in this proceeding.

In a notice of apparent liability for forfeiture issued to PCS 2000 L.P. ("PCS 2000") in January 1997, the Commission stated that Mr. Easton had (1) intentionally misrepresented facts, (2) submitted forged documents, (3) destroyed files, and (4) concealed facts. See *PCS 2000, L.P.*, 12 FCC Rcd 1703, 1715 (1997) ("*PCS 2000 NAL*"). Based on a non-public investigation, the Commission announced:

1/ PCS 2000 NAL, 12 FCC Rcd at 1714-15 (footnotes omitted). The facts were in dispute. Mr. Easton steadfastly denied that he made intentional misrepresentations.

When it denied a formal request for a hearing on PCS 2000's alleged misrepresentations, the Commission repeated its claim that "there are no unresolved questions of fact with respect to the misrepresentations made by Mr. Easton. The relevant facts are not in dispute and the issue can be disposed of based on these uncontested facts." *PCS 2000 L.P.*, 12 FCC Rcd 1681, 1689 (1997) ("*PCS 2000 MO&O*"). The Commission held there was "no need" for a hearing, because Mr. Easton no longer held an attributable interest in PCS 2000. *Id.* PCS 2000, which had bid \$344,293,125 for fifteen licenses, was found qualified. *See id.* at 1700-1.

Based on its finding that Mr. Easton had misrepresented facts, the Commission assessed a \$1,000,000 forfeiture against PCS 2000. *See PCS 2000 NAL*, 12 FCC Rcd at 1718-19. PCS 2000 paid the forfeiture, and the Commission considers its *PCS 2000 NAL* to be a final order. *See Order* at 3 n.10. But the Commission was not willing to let the matter rest.

Despite the Commission's representation that no unresolved questions of fact remained concerning PCS 2000's bids on January 23, 1996, the Wireless Telecommunications Bureau ("Bureau") conducted a "further investigation" into the matter which included taking at least four depositions. *See id.* at 5 n.25. On September 9, 1997, the Commission designated the applications of Westel Samoa, Inc. and Westel, L.P. (collectively "Westel") for hearing to determine the complicity of Westel's principal, Quentin L. Breen, in the misrepresentations allegedly made by Mr. Easton. *See id.* at 4 (¶ 7).

Although it recognized that Mr. Easton was not seeking any

authorizations, see *Order* at 18 (¶ 45), the Commission nevertheless ordered him to show cause "why he should be barred from holding any Commission authorizations", see *id.* at 2 (¶ 2). The Commission explained that "it is both more efficient and more fair to consider his fitness to be a Commission licensee at this time since we must decide whether we can grant the Westel applications . . . controlled by Mr. Breen, and for all practical purposes, we cannot examine Mr. Breen's role in this controversy without examining Mr. Easton's." *Id.* at 18 (¶ 45).

The Commission ordered Mr. Easton to show cause, but it did not reopen the issue of whether he intentionally misrepresented or withheld facts. It only permitted Mr. Easton to appear and give evidence on a single issue: "To determine, based on [his] misrepresentations before and lack of candor exhibited towards the Commission, whether [he] should be barred from holding Commission authorizations and participating in future Commission auctions." *Id.* at 20 (¶ 53). That issue was framed to foreclose any inquiry into whether Mr. Easton actually engaged in misconduct (and whether PCS 2000 actually was liable for a \$1 million forfeiture).

Mr. Easton was ordered to show cause why he should not be disqualified, when there had never been an adjudicative determination that he engaged in "intentional deceptions". *PCS 2000 NAL*, 12 FCC Rcd at 1715. In effect, Mr. Easton was required to appear at his sentencing hearing having never had a trial.

We will show that the Commission is without jurisdiction over Mr. Easton, and that its treatment of him violates section 1.91(b)

of the Commission's Rules ("Rules"), section 312(c) of the Act, and the Due Process Clause of the Fifth Amendment.

Because the Commission's show cause order was ultra vires, and because the Bureau was using the "formal enforcement proceeding" to impede his state court action ^{2/}, Mr. Easton notified the presiding officer that he would not appear at the show cause hearing. ^{3/} However, he continues to insist that he engaged in no intentional misconduct.

Standing

Section 405(a) of the Act provides, "After an order, decision, report, or action has been made or taken in any proceeding by the Commission . . . any person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration" 47 U.S.C. § 405(a) (emphasis added). That unequivocal language confers on Mr. Easton "a statutory right to petition for reconsideration." *Fair Oaks Cellular Partners*, 10 FCC Rcd 9980, 9981 (1995). See *Southland Industries, Inc. v. FCC*, 99 F.2d 117, 121 (D.C. Cir. 1938). He is exercising that right in order to challenge the Commission's jurisdiction and to assert his due process rights.

The Commission lacked the authority to order Mr. Easton to appear before it in a show cause hearing. On September 8, 1997,

^{2/} See *infra* Attachment A at 1 (Letter of Howard C. Davenport to Clerk, Superior Court of the State of California, County of San Mateo (Sept. 22, 1997)).

^{3/} See Letter of George L. Lyon, Jr. to Administrative Law Judge Arthur I. Steinberg (Sept. 29, 1997).

when the *Order* was adopted, he was not a licensee or an applicant for a license. See *Order* at 18 (¶ 45). He was not violating, or failing to observe, any provision of the Act, or sections 1304, 1343 or 1464 of Title 18, or any rule. Nor was Mr. Easton otherwise engaged in an activity that would warrant the exercise of the Commission's jurisdiction. Therefore, as we will show, the Commission exceeded its authority when it ordered Mr. Easton to show cause. See *infra* pp. 10-14.

Mr. Easton's interests will be adversely affected if the Commission proceeds with its ultra vires show cause hearing. His refusal to appear at the hearing could be deemed a waiver, see 47 C.F.R. § 1.92(c), and used as the Commission's excuse to ban him from future Commission proceedings, see 47 C.F.R. § 1.92(d). The injury such a ban would inflict, and the possibility the ban would be given res judicata effect, is sufficient to afford Mr. Easton standing to contest the Commission's jurisdiction. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985).

Mr. Easton also has standing to seek a vacatur. If it does not rescind its show cause order, the Commission will deprive Mr. Easton of his rights without giving him the hearing required by due process. And an agency's failure to provide procedural due process is a recognized basis for standing. See III Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 16.5, at 31 (3d ed. 1994).

The Commission clearly injured Mr. Easton's reputation and future employment prospects in January 1997, when it "specifically

concluded that [he] had made material misrepresentations." *Order* at 4 (¶ 70). The due process remedy for the stigma imposed on Mr. Easton was to give him the "opportunity to clear his name". *Board of Regents v. Roth*, 408 U.S. 564, 573 n.12 (1972). Rather than providing him with a post-deprivation hearing to clear his name, the Commission exacerbated the deprivation by its failure to give Mr. Easton the full and fair hearing mandated by section 312 of the Act (and section 1.91 of the Rules).

Mr. Easton has standing to enforce his procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992). He will show that the Commission's refusal to provide the evidentiary hearing required by section 312 threatens three distinct interests that are "concrete and particularized" to him. *Id.* at 560.

The Commission is employing the cease and desist procedures of section 312 to "bar" Mr. Easton from being a licensee or an auction participant. *See Order* at 20 (¶ 53). Consequently, Mr. Easton faces a prior restraint on his "exercise of free and unlimited access to this agency." *ATS Mobile Telephone, Inc.*, 35 FCC 2d 443, 468 (1972). Certainly, he has a concrete and cognizable interest in maintaining his access to the Commission. ^{4/}

^{4/} Moreover, since Mr. Easton would be denied the right to participate in Commission licensing proceedings for mass media facilities, he could face a prior restraint on his exercise of First Amendment rights.

Mr. Easton also has a concrete interest in his reputation that is cognizable for purposes of standing. *See Meese v. Keene*, 481 U.S. 465, 476 (1987). The Commission has published three orders charging that he intentionally misrepresented facts. *See Order* at 16-17 (¶ 39); *PCS 2000 NAL*, 12 FCC Rcd at 1715; *PCS 2000 MO&O*, 12 FCC Rcd at 1688. Since that accusation involves dishonesty, it is sufficiently "stigmatizing" to Mr. Easton's "reputation, honor and good name in the community to implicate [due process] liberty interests". *Winegar v. Des Moines Independent Community School District*, 20 F.3d 895, 899 (8th Cir. 1994).

Finally, Mr. Easton's due process liberty interests will be impaired if he is formally disqualified from pursuing his chosen career in the wireless telecommunications field, *see Kartseva v. Department of State*, 37 F.3d 1524, 1527-28 (D.C. Cir. 1994), or if he is blacklisted from bidding in spectrum auctions, *cf.*, *Transco Security, Inc. of Ohio v. Freeman*, 639 F.2d 318, 321 (6th Cir.), *cert. denied*, 454 U.S. 820 (1981). Those interests are threatened if the Commission proceeds with its show cause hearing to issue some sort of prohibitory order that disqualifies Mr. Easton.

Mr. Easton has concrete interests at stake sufficient to meet the procedural standing requirements of *Lujan*. He does not have to show that he will actually be harmed. "The person who has been accorded a procedural right to protect his concrete interests can assert the right without meeting all the normal standards for redressibility and immediacy." *Lujan*, 504 U.S. at 572 n.7. *See Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995).

Ripeness

Consideration of this petition is not barred by section 1.106(a)(1) of the Rules, which provides that a petition for reconsideration of an "order designating a case for hearing" will only be entertained if it "relates to an adverse ruling with respect to a petitioner's participation." 47 C.F.R. § 1.106(a)(1). Because the show cause order assumes Mr. Easton committed the misconduct alleged, but does not give him an opportunity to contest that assumption, the Order includes an adverse ruling with respect to Mr. Easton's participation in this proceeding.

Mr. Easton is not challenging the Commission's order designating the Westel applications for hearing. See Order at 20 (¶ 53). He is contesting the Commission's jurisdiction to order him to appear before it to "show cause why he should not be barred from holding any Commission authorizations." *Id.* at 2 (¶ 2). The issue of subject matter jurisdiction may be raised at any time. *Rath Packing Co. v. Becker*, 530 F.2d 1295, 1303 (9th Cir. 1975), *aff'd*, 430 U.S. 519 (1977). Thus, Mr. Easton is not required to go through an ultra vires (and expensive) show cause proceeding before he can challenge the Commission's jurisdiction to issue the show cause order.

The show cause order against Mr. Easton does not constitute an "order designating a case for hearing". A "case" is defined generally as "an action, cause, suit, or controversy, at law or in equity; a question contested before a court of justice; an aggregate of facts which furnishes occasion for the exercise of the jurisdic-

tion of a court of justice." Black's Law Dictionary 215 (6th ed. 1990). Under that definition, there was no "case" involving Mr. Easton pending before the Commission when it ordered him to show cause. Certainly, his qualifications to hold a Commission authorization were not at issue, in controversy, or contested before the Commission.

Mr. Easton does not concede that the show cause order afforded him a "hearing" within the meaning of section 312(c) of the Act. The purpose of a section 312(c) show cause hearing is to determine whether the respondent is acting in violation of the Act or the Rules and, if so, whether he should be ordered to "cease and desist" that activity. See 47 U.S.C. § 312(b); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 179-80 (1968). Mr. Easton is not being given a hearing to decide whether he is in compliance with the Act or the Rules. Moreover, because the Commission prejudged the facts in a nonadversarial investigative proceeding, Mr. Easton will not receive the hearing before an impartial tribunal required by due process. See *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591-92 (D.C. Cir. 1970).

In any event, the Commission cannot invoke its procedural regulations as a basis for refusing to consider a nonfrivolous petition for reconsideration, see *Crosthwait v. FCC*, 584 F.2d 550, 555 (D.C. Cir. 1978), and it has reconsidered designation orders in the past, see *Seattle Public Schools*, 60 Rad. Reg. 2d (P&F) 1073, 1075 (1986); *Storz Broadcasting Co.*, 51 FCC 2d 575, 575 (1975); *Burns, Rieke, and Voss Associates*, 41 FCC 2d 851, 852 n.2 (1973). Moreover, it cannot

ignore constitutional claims timely advanced in an enforcement proceeding. *See Meredith Corp. v. FCC*, 809 F.2d 863, 869-70 (D.C. Cir. 1987). Thus, section 1.106(b)(1) of the Rules can not be construed to bar Mr. Easton's challenge to the show cause order.

Finally, the Commission must consider the purposes of the administrative remedy of reconsideration, *see Saginaw Broadcasting Co. v. FCC*, 96 F.2d 554, 558 (D.C. Cir.), *cert. denied*, 305 U.S. 613 (1938), which are to protect existing rights and interests, *see Yankee Network v. FCC*, 107 F.2d 212, 217 (D.C. Cir. 1939), and to afford "the Commission the initial opportunity of correcting any errors . . . and generally passing upon all matters prior to their presentation to a reviewing court." *Action for Children's Television v. FCC*, 564 F.2d 458, 468-69 (D.C. Cir. 1977). Mr. Easton's petition is intended for those purposes and should be entertained, even if it requires the Commission to waive the limitations of section 1.106(a)(1).

Argument

"The absolute fundamentals of due process are jurisdiction, adequate notice, and a fair hearing." *United States v. Certain Parcels of Land in Prince Georges County, Md.*, 40 F.Supp. 436, 441 (D. Md. 1941). None of those fundamentals are evidenced by the Commission's show cause order against Mr. Easton.

I. The Commission Lacks Statutory Jurisdiction

Obviously, Congress confers jurisdiction; the Commission "may not confer upon itself power." *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986). *See Sterling Manhattan Cable Televi-*

sion, Inc., 38 FCC 2d 1149, 1156 (1973) ("Our jurisdiction and power can be no greater than that which Congress has conferred upon us"). Thus, the Commission cannot impose a sanction or issue an order "except with jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b). In this case, the Commission is without jurisdiction over Mr. Easton and it was not authorized by law to order him to show cause.

The Commission has been given jurisdiction with respect "to all interstate and foreign communication by wire or radio . . . and to all persons engaged within the United States in such communication" 47 U.S.C. § 152(a). Mr. Easton is not engaged in interstate or foreign communication. Therefore, he is not subject to the Commission's jurisdiction. See *California Water and Telephone Co.*, 64 FCC 2d 753, 759 (1977). Moreover, since he is not seeking Commission authorization to "use or operate any apparatus for the transmission of energy or communications or signals by radio", Mr. Easton is not subject to the Commission's licensing authority under Title III of the Act. See 47 U.S.C. § 301. ^{5/}

^{5/} The Commission does not have authority over Mr. Easton under section 4(i) of the Act, 47 U.S.C. § 154(i). Section 4(i) is not an independent grant of jurisdiction; it confers on the Commission only such power as is ancillary to its specific statutory responsibilities. *Iowa Utilities Board v. FCC*, No. 96-3321, slip op. at 103-4 (8th Cir. July 24, 1997); *People of the State of California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990). Thus, section 4(i) could only provide the Commission with ancillary authority to issue orders as may be necessary to fulfill its "primary directives" contained in Title III of the Act. *Iowa Utilities*, slip op. at 103. But, in this case, section 4(i) cannot supply the Commission with its missing Title III jurisdiction over Mr. Easton.

The Commission cited sections 309(e), 312(a), and 312(c) of the Act as its authority to order Mr. Easton to appear and show cause. See Order at 20 (¶ 53). Because Mr. Easton is not an applicant or a licensee, sections 309(e) and 312(a) of the Act obviously do not apply. See 47 U.S.C. §§ 309(e), 312(a). Only section 312(c) could apply to him as a non-licensee. See *Valley Vision, Inc. v. FCC*, 399 F.2d 511, 514 (9th Cir. 1968).

The Commission could claim authority under section 312(c) to issue a show cause order to Mr. Easton only if he were engaged in the type of conduct described in subsections 312(b)(2) and 312(b)(3). In that case, Mr. Easton would be subject to the Commission's authority to order him "to cease and desist from such action." 47 U.S.C. § 312(b). We will show, however, that the Commission has not alleged that he is currently engaged in any violations that would subject him to its authority to issue cease and desist orders. See *infra* p. 13.

II. The Commission Lacks Authority Under Section 312(c) Of The Act

Section 312(b) of the Act "provides that where a person has violated the Act or the Rules, the Commission may order that person to cease and desist from such action." *Terrance R. Noonan*, 67 FCC 2d 62, 64 (1977). See *Southwestern Cable*, 392 U.S. at 180. Before a section 312(b) cease and desist order can be issued, section 312(c) requires the Commission to serve the respondent with "an order to show cause why . . . [the] cease and desist order should not be issued." 47 U.S.C. § 312(c). Thus, Mr. Easton would be sub-

ject to the Commission's authority to issue a show cause order only if he were "violat[ing] of fail[ing] to observe" the Act or the Rules. See 47 U.S.C. § 312(b). However, the Commission does not allege that Mr. Easton engaged in any unlawful act after June 28, 1996.

The only matters addressed in the Order concern Mr. Easton's alleged "misrepresentations before and lack of candor exhibited towards the Commission". Order at 20 (¶ 53). First, the Commission stated that on January 23, 1996, Mr. Easton misrepresented facts in a telephone conversation with a Commission employee and sent forged documents to the Commission. See *id.* at 7-8 (¶ 14), 16-17 (¶ 39). Second, he purportedly lacked candor in his January 26, 1996 declaration. See *id.* at 7 (¶ 39). Third, he was blamed for deleting and destroying documents on or before February 7, 1996. See *id.* at 14 (¶ 32), 18 (¶ 43). Finally, Mr. Easton was supposed to have lacked candor in the "additional" declaration he submitted on June 28, 1996. See *id.* at 15 (¶ 35), 18 (¶ 42). These four alleged instances of wrongdoing in 1996 do not constitute violations of the Rules or the Act which the Commission is empowered to enjoin in September 1997.

The Commission has reached well beyond the bounds of its authority under section 312(b) to grasp Mr. Easton. Clearly, section 312(b) only "authorizes the Commission to prohibit unlawful acts". Noonan, 67 FCC 2d at 65. Here, the Commission did not direct Mr. Easton to show cause why he should not be ordered to "cease and desist" any unlawful conduct. Rather, he faces some form

of prohibitory order (or preventive injunction) barring him from obtaining a license or bidding on spectrum in the future. Thus, the Commission is attempting to prohibit conduct that is lawful -- "holding Commission authorizations and participating in future Commission auctions." Order at 20 (¶ 53). Section 312(b) does not authorize the imposition of such a prior restraint on Mr. Easton.

III. The Show Cause Order Did Not Provide The Requisite Due Process Safeguards

The Commission has the authority to suspend or modify its orders. 47 U.S.C. § 416(b). Plainly, the Order should be modified to comport with the limits of the Commission's jurisdiction and the requirements of due process. In particular, the Commission should vacate that portion of paragraph 53 that contains the show cause order directed to Mr. Easton.

The Commission not only lacked jurisdiction to issue the show cause order, but it did not offer Mr. Easton the notice and fair hearing required by law. The Order did not afford him the procedural safeguards provided in section 312 of the Act to restrict the Commission's power to issue cease and desist orders. See *Southwestern Cable Co. v. United States*, 378 F.2d 118, 121 (9th Cir. 1967), *rev'd on other grounds*, 392 U.S. 157 (1968).

A. The Statutory Violations

Section 312(e) of the Act expressly provides that the procedural protection of section 9(b) of the Administrative Procedure Act ("APA") applies to cease and desist proceedings. See 47 U.S.C. § 312(e). Under section 9(b) of the APA, the Commission could not

institute a cease and desist proceeding until Mr. Easton had been given "(1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements". 5 U.S.C. § 558(c). Mr. Easton was not given notice and the opportunity to show that he had "put [his] house in order" before the Commission issued its show cause order. *Atlantic Richfield Co. v. United States*, 774 F.2d 1193, 1200-1 (D.C. Cir. 1985) (quoting *Blackwell College of Business v. Attorney General*, 454 F.2d 928, 933-34 (D.C. Cir. 1972)).

Under section 312(c) of the Act (and section 1.91(b) of the Rules), Mr. Easton was entitled to receive a show cause order that fairly advised him of the specific violations that would be the subject of the evidentiary inquiry. See 47 U.S.C. § 312(c); *Cable TV Co.*, 32 FCC 2d 783, 785-86 (Rev. Bd. 1971). He was also entitled to a hearing in which he could give evidence on the rule violation specified in the show cause order. See 47 U.S.C. § 312(c); 47 C.F.R. § 1.91(b). Finally, under section 312(d) of the Act (and section 1.91(d) of the Rules), Mr. Easton has the right to have the issue of his compliance with the Rules adjudicated on the basis of record evidence, see *Time Sales, Inc.*, 49 FCC 2d 1403, 1404 (1974), in "a prosecutory-type proceeding where the agency has the burden of proof." *Victor Muscat*, 31 FCC 2d 620, 621 (1971). The show cause order provided none of these protections.

The Commission has never specified a provision of the Act (or of 18 U.S.C. §§ 1304, 1343, or 1464) or a "rule or regulation" that Mr. Easton allegedly violated. 47 U.S.C. § 312(b)(3). The Commis-

sion has only charged Mr. Easton with violating its policies. See *Order* at 16 nn.110-11, 17 n.114, 18 n.121. See also *PCS 2000 NAL*, 12 FCC Rcd at 1714 nn.62, 63, 1715 n.65, 1716 n.69. However, violations of Commission's policies are not cognizable under section 312(b) of the Act. ^{6/}

The Act provides that the Commission may revoke a license "for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of [the Act]." 47 U.S.C. § 312(a)(1). However, no provision of the Act expressly prohibits a non-licensee or a non-applicant from misrepresenting facts or displaying a lack of candor before the Commission. Nor do sections 1304, 1343 or 1464 of Title 18.

The "rule[s] and regulation[s] of the Commission" that are enforceable by a cease and desist order, see 47 U.S.C. § 312(b)(3), are contained in chapter I of title 47 of the Code of Federal Regulations, see 47 C.F.R. § 0.411(b). None of those rules explicitly prohibit a person from making a misrepresentation or attempting to mislead a Commission employee in a telephone conversation; nor prohibit a person from submitting a forged document; nor prohibit a person from deleting computer files. Only section 1.17 of the Rules codifies the Commission's policies regarding truthfulness and candor. See 47 C.F.R. § 1.17; *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252, 3253 (1990).

^{6/} The cease and desist provisions of section 312(b) are punitive and must be construed strictly. See *Didriksen v. FCC*, 254 F.2d 354, 356 (D.C. Cir. 1958).

Section 1.17 of the Rules generally requires "[t]ruthful written statements and responses to Commission inquiries and correspondence." 47 C.F.R. § 1.17. The rule also provides, "No applicant, permittee or licensee shall . . . in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission" *Id.* Clearly, the rule applies to "all applicants, licensees, and permittees for all radio facilities." *Policy Regarding Character Qualifications*, 5 FCC Rcd at 3253. Accordingly, the rule did not apply to Mr. Easton personally in 1996, and the rule most certainly does not apply to him now.

The show cause order does not give Mr. Easton the fair hearing required by the Act. Implicit in section 312 is the requirement that the Commission provide the respondent with an evidentiary hearing, see *National Anti-Vivisection Soc. v. FCC*, 234 F.Supp. 696, 697 (D. Ill. 1964), in which he may "give evidence" on the alleged rule violation, see 47 U.S.C. § 312(c). In such a hearing, "both the burden of proceeding and the burden of proof" is on the Bureau, see 47 U.S.C. § 312(d), and it would have to prove its case by "clear and convincing evidence", see *Sea Island Broadcasting Corp. of S.C. v. FCC*, 627 F.2d 240, 244 (D.C. Cir.), cert. denied, 449 U.S. 834 (1980). Mr. Easton's show cause hearing would bear no resemblance to the hearing mandated by section 312.

Mr. Easton was not being given (and never has been given) an evidentiary hearing wherein the Bureau would carry the burden of proving that he misrepresented facts and displayed a lack of candor

in violation of any specific provisions of the Act or the Rules. Unlike the Commission's treatment of Mr. Breen, no issue was designated for hearing that would have permitted an inquiry into "the facts and circumstances surrounding the conduct of [Mr. Easton] in connection with PCS 2000's bids placed on January 23, 1996." Order at 20 (¶ 53). And unlike the Commission's practice with respect to show cause hearings, no issue was included that would have permitted the introduction of evidence going to whether Mr. Easton committed any rule violations. Compare *Commercial Realty St. Pete, Inc.*, 10 FCC Rcd 4313, 4320-22 (1995); *Algreg Cellular Engineering*, 6 FCC Rcd 2921, 2928 (Com. Car. Bur. 1991).

B. The Due Process Violations

The Commission's show cause order ultimately "must be measured against the demands of due process", *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981), cert. denied, 457 U.S. 1119 (1982), which apply in administrative adjudications, see *Amos Treat & Co. v. SEC*, 306 F.2d 260, 264 (D.C. Cir. 1962). Due process requires "[a] fair trial in a fair tribunal." *Antoniou v. SEC*, 877 F.2d 721, 724 (8th Cir. 1989) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). It demands both "a hearing with fairness and the appearance of fairness." *Staton v. Mayes*, 552 F.2d 908, 914 (10th Cir.) (as amended), cert. denied, 434 U.S. 907 (1977). The Commission cannot provide Mr. Easton with such a hearing.

A fair hearing must include "a neutral, or unbiased, adjudicatory decisionmaker." Davis, *supra*, § 9.8, at 67. An agency is not neutral if it has "prejudged disputed issues of adjudicative fact."

Davis, *supra*, § 9.8, at 78. Thus, the test for agency disqualification is whether "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Antoniou*, 877 F.2d at 725 (quoting *Cinderella*, 425 F.2d at 591). The Commission cannot pass that test in light of its statements in *PCS 2000 NAL* and *PCS 2000 MO&O*. See *supra* pp. 1-2. The Commission has the unmistakable appearance of a closed mind on the factual issues concerning Mr. Easton's conduct in the aftermath of PCS 2000's Norfolk bid.

Finally, Mr. Easton would have a cause of action for violation of his due process liberty interests, if the Commission proceeds to issue an order barring him from holding authorizations and participating in auctions. See *supra* p. 7. That order would be a "binding disqualification" that would largely preclude Mr. Easton from pursuing his career in the wireless field. *Kartseva*, 37 F.3d at 1528. That change in his legal status would implicate a liberty interest protected by the Fifth Amendment. See *id.* Yet, Mr. Easton would never have been given a fair opportunity to remove the stigma of the Commission's oft-repeated claim that he had engaged in "serious" misconduct. *Order* at 19 (¶ 48); *PCS 2000 NAL*, 12 FCC Rcd at 1716. And the presence of injury to a cognizable liberty interest gives due process import to the Commission's failure to provide Mr. Easton with the evidentiary hearing required by section 312(c) of the Act.

Issued without authority and in violation of section 9(b) of the APA, the Commission's show cause order initiated an ultra vires hearing in which Mr. Easton would have none of the safeguards man-

dated by section 312, and no opportunity to clear his name. Because the order was based on the Commission's prejudgment of his guilt, any adjudication based on that order would be impermissibly tainted with unfairness. Consequently, the Commission should nullify its show cause order. See *Antoniou*, 877 F.2d at 726.

IV. The Commission's Summary Procedures
Violated Mr. Easton's Due Process Rights

The forfeiture procedures under section 503(b) of the Act call for the Commission to issue a written "notice of *apparent* liability" setting forth the specific nature of the "act or omission *charged*" against the alleged violator. 47 U.S.C. § 503(b)(4) (emphasis added). However, as was the case in *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 403 (D.C. Cir. 1975), the PCS 2000 NAL "includes terms of conclusions, while the statute contemplates only charges." The Commission's "conclusion" that Mr. Easton had misrepresented facts, see PCS 2000 NAL, 12 FCC Rcd at 1718-19, caused him reputational injury and triggered his right to be heard. As we will show, the Commission violated due process by not giving him a prompt evidentiary hearing in which he could "tell his side of the story." *Winegar*, 20 F.3d at 901.

Based on a record compiled in a non-public investigation, the Commission announced in its PCS 2000 NAL that Mr. Easton had "intentionally misrepresented facts" and perpetrated other "intentional deceptions". 12 FCC Rcd at 1715. The stigma of those accusations triggered Mr. Easton's due process right to be given a meaningful "opportunity to refute the charge[s]." *Roth*, 408 U.S. at 573.

Obviously, because the charges against him were in dispute and involved the issue of his intent, Mr. Easton could clear his name only in "the crucible of an evidentiary hearing." *RKO General*, 670 F.2d at 225 (quoting *Walton Broadcasting, Inc.*, 78 FCC 2d 857, 877 (1980)).

The Commission could have determined whether Mr. Easton engaged in intentional deception only in the hearing on PCS 2000's qualifications that was required by section 309(e) of the Act, 47 U.S.C. § 309(e). As the Commission now admits, the issue of whether Mr. Easton acted with the intent to deceive involves questions of veracity and credibility that can only be resolved in a hearing. See Order at 17 (¶¶ 40, 41). However, lured by the prospect of \$344 million in PCS 2000 auction payments, or perhaps persuaded by the ex parte arguments of persons with a financial interest in making Mr. Easton a scapegoat, the Commission decided not to designate PCS 2000's application for a Title III hearing to determine whether one of PCS 2000's officers misrepresented facts to "cover up [its] mistaken bid." *PCS 2000 NAL*, 12 FCC Rcd at 1718. Instead, the Commission initiated a forfeiture proceeding in which Mr. Easton could not participate. See *id.* at 1719.

The forfeiture order was imposed against PCS 2000 under the summary procedures of section 503(b)(4) of the Act, 47 U.S.C. § 503(b). Mr. Easton had no express right to appeal the Commission's findings and conclusions. Only PCS 2000 had the right to contest the Commission's determination and Mr. Easton certainly was not in privity with PCS 2000.